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12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA

14 GARY HOFMANN, an individual, and
15 on behalf of all others similarly situated,

16 Plaintiff,

17 vs.

18 FIFTH GENERATION, INC., a Texas
19 corporation; and DOES 1 through 100,
20 inclusive,

21 Defendants.
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Civil Action No.: 14-cv-2569-JM-JLB

CLASS ACTION

PLAINTIFF'S *EX PARTE*

**APPLICATION FOR LEAVE TO
FILE UNDER SEAL**

INFORMATION SET FORTH IN

PLAINTIFF'S OPPOSITION TO

DEFENDANT'S MOTION FOR

SUMMARY JUDGMENT AND

PLAINTIFF'S EVIDENTIARY

OBJECTIONS; SUPPORTING

DECLARATION OF JOHN H.

DONBOLI

Date: October 19, 2015
Time: 10:00 a.m.
Fl./Room: 5D

1 Plaintiff Gary Hofmann respectfully moves *ex parte* for an order permitting
 2 him to file under seal information in the following document, which is also being
 3 lodged contemporaneously, in un-redacted form, with the Court:

- 4 • Declaration of Bert Butler (“Tito”) Beveridge II in Support of
 5 Defendant Fifth Generation, Inc.’s Motion for Summary Judgment
 6 dated August 28, 2015, (See Docket. Nos. 45 and 46, Filed Under
 7 Seal), now repeated in Plaintiff’s Evidentiary Objections to Proffered
 8 Evidence set forth in Defendant Fifth Generation’s Motion for
 9 Summary Judgment, at **page 3, lines 13-17, 24-28; page 4, lines 1-15,**
 10 **23-24; page 5, lines 2-4, 12-13, 17-24; page 6, lines 15-25; page 7,**
 11 **lines 2-3, 8-9, 16-21; page 8, lines 2-4, 9-10, 15-21; page 9, 3-8, 14-**
 12 **18, 24-27; and page 10, lines 4-7, 13-15, and 20-23.**
- 13 • Exhibits to Declaration of Bert Butler (“Tito”) Beveridge II in Support
 14 of Defendant Fifth Generation, Inc.’s Motion for Summary Judgment
 15 dated August 28, 2015, (See Docket. Nos. 45 and 46, Filed Under
 16 Seal), now repeated in Plaintiff’s Opposition to Defendant Fifth
 17 Generation, Inc.’s Motion for Summary Judgment, at **page 3, lines**
 18 **14-27; and page 4, lines 1-5.**

19 This *ex parte* Motion is based upon the points and authorities cited herein, as
 20 well as the supporting declaration of John H. Donboli, filed concurrently herewith.
 21 For the reasons that follow, Plaintiff respectfully requests the Court grant the relief
 22 requested.

23 **I. SUMMARY OF REQUESTED RELIEF**

24 Defendant Fifth Generation, Inc. (“Defendant”) applied *ex parte* for relief
 25 from the Court for leave to file the Declaration of Bert Butler (“Tito”) Beveridge II
 26 and its supporting exhibits under seal. Docket No. 45. The Court granted
 27 Defendant’s application and Mr. Beveridge’s declaration was filed under seal.
 28 Docket No. 50. In this *ex parte* application, Plaintiff seeks to respect the Court’s

1 order by filing redacted versions of his Objections to Defendant's Proffered
 2 Evidence and Opposition to Defendant's Motion for Summary Judgment. Plaintiff
 3 will concurrently lodge non-redacted versions of these documents with the Court.
 4 This application is made pursuant to the Protective Order (Docket No. 42) entered
 5 by this Court on August 14, 2015.

6 As explained in greater detail in the Declaration of Bryan Plater filed in
 7 support of Defendant's *ex parte* request to file Mr. Beveridge's declaration under
 8 seal, the sealed declaration "consist[s] of internal and non-public, proprietary
 9 information and trade secrets relating to the business of Fifth Generation, namely
 10 the distilling and selling of Tito's Handmade Vodka. *See generally*, Declaration of
 11 Bryan Plater, Docket No. 45, page 5. According to Mr. Plater, "[d]isclosure of this
 12 information would harm Fifth Generation's business and competitive position,
 13 particularly because the spirits market is highly competitive and each company
 14 holds its proprietary information in the strictest confidence." *Id.*

15 **II. LEGAL ARGUMENT**

16 Although there is a presumptive right of public access to court records based
 17 upon common law and first amendment grounds, such access may be denied by the
 18 court in order to protect confidential information. *Phillips ex rel. Estates of Byrd v.*
 19 *General Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002). The disclosure of
 20 trade secrets and information only tangentially related to the cause of action are
 21 sufficient justifications to seal court records. *Forsythe v. Brown*, 2011 U.S. Dist.
 22 LEXIS 125489 (D. Nev. Oct. 27, 2011) (citing *Kamakana*, 447 F.3d at 1179).

23 The test for the existence of trade secrets is "whether the matter sought to be
 24 protected is information (1) which is valuable because it is unknown to others and
 25 (2) which the owner has attempted to keep secret." *Dealertrack, Inc. v. Huber*, 460
 26 F. Supp. 2d 1177, 1183-1184 (C.D. Cal. 2006). Internal data regarding costs,
 27 budgets, and profit margins are protectable trade secrets. *First Advantage*
 28 *Background Servs. Corp. v. Private Eyes, Inc.*, 569 F. Supp. 2d 929, 942 (N.D.

1 Cal. 2008) (citing *Whyte v. Schlage Lock Co.*, 101 Cal. App 4th 1443, 1455-56
 2 (Cal. App. 2002)).

3 Defendant is a privately-held company that has never made the sealed
 4 documents publicly available. Docket No. 45. The information that Plaintiff seeks
 5 to redact via this *ex parte* application consists solely of information already
 6 protected by the Sealing Order – specifically, the Declaration of Bert Butler
 7 (“Tito”) Beveridge and supporting exhibits. *See* Docket No. 50.

8 This Court has recognized that good cause exists to seal information
 9 contained in Mr. Beveridge’s Declaration, *see id.*, and the same good cause exists
 10 to seal that same information from Plaintiff’s Objections to Evidence Proffered in
 11 Support of Defendant’s Motion for Summary Judgment, and Plaintiff’s Opposition
 12 to Defendant’s Motion for Summary Judgment. Plaintiff respectfully requests that
 13 the Court grant this *ex parte* application to seal this information in accordance with
 14 the Sealing Order.

15 Dated: October 5, 2015

Respectfully submitted,

16 DEL MAR LAW GROUP, LLP

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 18 By: /s/ John H. Donboli

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 Hofmann, an individual, and all
 others similarly situated

DECLARATION OF JOHN H. DONBOLI

I, John H. Donboli, declare:

1. I am counsel of record for Plaintiff Gary Hofmann and the putative class in this action. I am a member in good standing of the State Bar of California and the United States District Courts for the Northern, Central, Eastern and Southern Districts of California; and of the United States Court of Appeals for the Ninth Circuit.

2. I submit this declaration in support of Plaintiff's *Ex Parte* Application for Leave to File Under Seal Information Set Forth in Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Plaintiff's Evidentiary Objections to Proffered Evidence set forth in Defendant's Motion. I make this Declaration based on personal knowledge and if called to testify, I could and would competently testify to the matters contained herein.

3. As explained in greater detail in the Declaration of Bryan Plater filed in support of Defendant's *ex parte*, the sealed declaration "consist[s] of internal and non-public, proprietary information and trade secrets relating to the business of Fifth Generation, namely the distilling and selling of Tito's Handmade Vodka." See generally, Declaration of Bryan Plater, Docket No. 45, page 5.

4. According to Mr. Plater, "[d]isclosure of this information would harm Fifth Generation's business and competitive position, particularly because the spirits market is highly competitive and each company holds its proprietary information in the strictest confidence." *Id.*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 5th day of October 2015 in San Diego, California.

By: /s/ John H. Donboli